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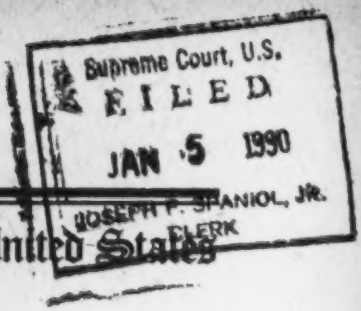

No. 89-688

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's change of policy regarding the propriety of railroad charges for hauling empty, privately owned cars to and from repair facilities was permissible.

2. Whether the Interstate Commerce Commission's decison to apply its change of policy in the proceeding in which it announced the change was permissible.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 872 F.2d 1048. The opinion of the court of appeals denying rehearing (Pet. App. 30a-34a) is reported at 883 F.2d 1029. The decision of the Interstate Commerce Commission dismissing petitioners' complaint (Pet. App. 37a-68a) is reported at 3 I.C.C.2d 599. The other decisions of the Interstate Commerce Commission (Pet. App. 69a-100a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on April 14, 1989, and a petition for

rehearing was denied on June 30, 1989 (Pet. App. 35a-36a). On September 13, 1989, the Chief Justice extended the time within which to petition for certiorari to and including October 28, 1989. The petition for certiorari was filed on October 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As common carriers, railroads are obligated to furnish sufficient numbers of suitable cars to satisfy their customers' reasonable transportation requirements. Pet. App. 4a, 38a. The Interstate Commerce Commission (the Commission) is responsible for regulating and enforcing railroads' car service obligations. 49 U.S.C. 11121. Railroads may satisfy their obligations to furnish cars in several ways. They may own their own cars, they may borrow cars from another railroad, or they may lease privately owned cars, which are often furnished by shippers. If railroads lease privately owned cars, they frequently must haul the empty cars to and from repair facilities. The issue in this litigation is whether the railroads may charge private car owners for hauling the empty cars to and from repair facilities. Pet. App. 4a-5a, 38a-39a.

2. In 1976 and 1980, Congress enacted significant changes in national rail transportation policy. In 1976, Congress passed the Railroad Revitalization and Reform Act (the 4R Act), Pub. L. No. 94-210, 90 Stat. 31, and, in 1980, Congress passed the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895. Both statutes were intended to increase the role of competition and market forces in railroad operations. The 4R Act, for instance, was intended, in part, "to eliminate needless or harmful regulatory constraints and to allow railroads to compete with other modes of transportation." S. Rep. No. 499,

94th Cong., 1st Sess. 1 (1975). The Staggers Act, for its part, explicitly states that "[i]n regulating the railroad industry, it is the policy of the United States Government * * * to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail, * * * to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission * * * [and] to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation." 49 U.S.C. 10101a.

3. In 1983, two railroads—respondents Indiana Harbor Belt Railway Company and the Baltimore and Ohio Chicago Terminal Railroad Company—filed tariffs for hauling empty, privately owned cars to and from repair facilities. Petitioners, which are private car owners, filed complaints challenging the action. Under then-existing Commission policy, a railroad could not levy a direct charge for transporting privately owned cars to and from repair facilities if it derived more than *de minimis* revenues from the loaded movements of the cars. That policy had been announced in *Union Tank Car Co., Terminal Service*, 268 I.C.C. 338 (1947), and was most recently reaffirmed in *General American Transportation Corp.* v. *Indiana Harbor Belt R.R.*, 357 I.C.C. 102 (1977) (*Indiana Harbor I*), aff'd, 577 F.2d 394 (7th Cir. 1978), a proceeding involving many of the same parties as the current litigation. Pet. App. 38a-42a. Under *Indiana Harbor I*, the cost of empty car repair moves was generally viewed as a collective responsibility of the railroad industry, subject to an "equalization" formula employed in an effort to distribute the costs equitably with respect to tank cars. Pet. App. 40a & n.5; 357 I.C.C. at 127.

Petitioners' complaints were referred to an Administrative Law Judge, who concluded that the *Indiana Harbor I* policy should no longer be applied because of subsequent legislative changes. Pet. App. 79a-91a. The Commission Review Board reversed the ALJ's decision. *Id.* at 92a-100a.

The full Commission then considered the matter. In October 1984, the Commission published a notice informing the public that the Commission might modify or reverse *Indiana Harbor I* in light of statutory changes and requesting comment on whether such a decision would be appropriate. 49 Fed. Reg. 39,740 (1984). In March 1985, the Commission published an additional notice, describing comments that had been filed, posing certain questions, and soliciting additional comments. 50 Fed. Reg. 10,867 (1985).

On February 17, 1987, the Commission issued its decision in *Indiana Harbor II*. Pet. App. 37a-68a. The Commission concluded that "the existing policy prohibiting tariff charges misallocates economic burdens among carriers and conflicts with the Congressional mandate for demand-based rail pricing, rate flexibility, and revenue adequacy." *Id.* at 38a. Accordingly, the Commission overruled *Indiana Harbor I*. The Commission first found that *Indiana Harbor I* "does not produce an efficient or equitable system for compensating rail carriers for repair moves" (Pet. App. 44a-45a) and that it results in "misallocation and cross-subsidization" (*id.* at 48a). The Commission then determined that the prohibition of charges for empty car repair moves was not compelled by statute. *Id.* at 48a-55a. To the contrary, the Commission reasoned that reconsideration of *Indiana Harbor I* "in light of the significant changes in the Commission's regulation of railroads resulting from the 4R Act and

Staggers Act" was "necessary." Pet. App. 55a.[1] The Commission concluded that the *Indiana Harbor I* "method of compensation for cars moving empty in repair moves is directly contrary to current statutory provisions that require the Commission to encourage efficient pricing and provide all carriers with a realistic opportunity to earn adequate revenues." Pet. App. 55a-56a. Finally, the Commission determined that it was appropriate to apply the decision to the tariffs at issue. *Id.* at 65a-66a.

On February 22, 1988, the Commission denied petitions to reopen (Pet. App. 69a-78a); it reiterated that the overruled ban on tariffs for empty repair moves was "outmoded, impractical, and irrational." *Id.* at 71a.

4. The court of appeals denied petitioners' petitions for review. Pet. App. 21a-27a. The court first rejected petitioners' contention that Congress specifically intended to bar carriers from charging for the empty movement of privately owned rail cars. Pet. App. 7a-10a. Although ~~that~~ the Seventh Circuit had twice affirmed the *Indiana Harbor I* policy, the court concluded that the Seventh Circuit's opinions did not rest "on a construction of the Interstate Commerce Act, much less a finding of specific congressional intent" and that the Seventh Circuit had "simply held that the *Indiana Harbor I* policy was not arbitrary and capricious." Pet. App. 9a. The court also rejected the claim that congressional actions in recodifying the Interstate Commerce Act and in enacting the Staggers Act were evidence of congressional ratification of the changed rule. *Id.* at 9a-10a. The court then found that the Commission's decision was reasonable, that the evidence in the

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[1] The Commission noted that, although the 4R Act had been passed shortly before *Indiana Harbor I*, the decision in *Indiana Harbor I* failed to give it adequate consideration and the Staggers Act had been passed since *Indiana Harbor I*. Pet. App. 41a-42a.

record supported the Commission's conclusions, that the policies underlying the 4R Act and the Staggers Act also supported the Commission's decision, and that the Commission had addressed all pertinent considerations. *Id.* at 10a-24a. Finally, the court concluded that the request for comments did not convert the adjudication into a rulemaking, and that application of the new policy to the tariffs under review was appropriate. *Id.* at 25a-27a.

Accompanying the denial of a petition for rehearing, Judge Silberman, joined by the other two members of the panel which had decided the case, issued a supplemental opinion addressing the principal contention in the rehearing petition that the proceeding was a rulemaking and thus could not be applied to the tariffs under review. Pet. App. 30a-34a. The opinion reiterated that a change in policy was permissible in an adjudication and that "[w]hat this case really reduces to is the fairness of retroactive application of the new principle developed in *Indiana Harbor II* to the adjudicatory parties, a question * * * adequately addressed in the original panel opinion." *Id.* at 34a.

ARGUMENT

Petitioners contend that the Commission's change in policy was impermissible and that, if it was permissible, it should not have been applied to the tariffs in the proceeding in which it was announced. Neither contention is well founded; the Commission's determinations, both about the change in policy and its application to the parties, were sound and do not warrant further review.

1. Petitioners first contend (Pet. 11-16) that Congress ratified the Commission's prior policy, and that a reversal of the policy "could be justified only by persuasive evidence that *Congress* had changed its mind." Pet. 12.

As evidence of congressional ratification, however, petitioners point only to the fact that "Congress extensively amended the Interstate Commerce Act in 1980 with passage of the Staggers Act" and "Congress did not make any pertinent changes to the provisions" on which the Commission had relied in *Indiana Harbor I* and on which the Seventh Circuit had relied in upholding the Commission's policy. Pet. 11-12. But as this Court has consistently warned, such reliance on congressional silence must be hedged with considerable caution.[2] An inquiry into congressional purpose and intent is necessarily contextual, and congressional silence is but one factor to be considered in such an inquiry.[3]

Petitioners' extensive reliance on congressional silence is especially unsound in this context. As the court of appeals explained, such reliance "is particularly weak in this case given the abundant evidence * * * that Congress, in passing

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[2] See, *e.g.*, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that—silence"); *Zuber* v. *Allen*, 396 U.S. 168, 185-186 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. * * * Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence."); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) ("Re-enactment * * * is an unreliable indicium at best."); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941) (congressional reenactment "is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.").

[3] Rather than "disarray" (Pet. 14), the decisions cited by petitioners (Pet. 14-15) reflect this necessarily contextual inquiry into congressional purpose and intent.

the Staggers Act, wanted to put an end to ratemaking practices involving railroad cross-subsidization and other inefficiencies." Pet. App. 10a n.10. Congressional passage of the Staggers Act without either explicitly disapproving *Indiana Harbor I* or authorizing a change in *Indiana Harbor I* thus cannot be construed as reflecting a congressional intent to bar the Commission from reexamining its policy regarding railroad charges for empty car repair moves.[4]

2. Petitioners also contend (Pet. 16-18) that the court of appeals' decision conflicts with three decisions of the Seventh Circuit—the decision affirming *Indiana Harbor I* (*Indiana Harbor Belt R.R.* v. *General American Transportation Corp.*, 577 F.2d 394 (1978)) and two subsequent decisions applying *Indiana Harbor I* (*Atchison, T.&S.F. Ry.* v. *Union Tank Car Co.*, 611 F.2d 1184 (1979); *Evans Products Co.* v. *ICC*, 729 F.2d 1107 (1984)). As the court below concluded, however, there is no conflict.

The court of appeals correctly noted that the Seventh Circuit decisions did not rest "on a construction of the Interstate Commerce Act," but rather on a determination that "the *Indiana Harbor I* policy was not arbitrary and capricious." Pet. App. 9a. Petitioners' argument to the

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[4] As the Commission noted (Pet. App. 64a), this Court has long stressed the importance of the Commission's ability to revise its policies in light of changed conditions. See *American Trucking Ass'ns* v. *Atchison, T.&S.F.R.R.*, 387 U.S. 397, 416 (1967) ("[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.").

contrary rests on the claim that the Seventh Circuit's opinions must be read as definitive statutory constructions, rather than as approvals of a permissible exercise of agency discretion. Pet. 16. In announcing its standard of review to guide consideration of *Indiana Harbor I*, however, the Seventh Circuit left no doubt that its decision rested on a finding of permissible administrative action:

> The responsibility of the court in reviewing a decision and order of the Commission properly before it consists in deciding 1. whether the Commission has acted within the power delegated to it by law; 2. whether the Commission's decision is supported by facts or substantial evidence; 3. whether the order is based on specific findings of fact from the record; 4. whether the Commission's conclusions have a rational basis.

577 F.2d at 397. Although, as petitioners point out, the Seventh Circuit referred to statutory provisions in its analysis (577 F.2d at 400), it is clear that those references are in the overall context of an inquiry into the reasonableness of the Commission's decision. See, *e.g.*, 577 F.2d at 396-397 (defining issue before the court as "Is the Commission's determination [in *Indiana Harbor I*] * * * rational and within the Interstate Commerce Commission's statutory powers?"); *id.* at 404 ("Therefore, in light of the standard of review enunciated in *Universal Camera Corp.* [v. *NLRB*, 340 U.S. 474, 488 (1951)], this Court now affirms the ruling of the Interstate Commerce Commission in all respects."). The Seventh Circuit's subsequent two decisions, moreover, are merely applications of *Indiana Harbor I*.[5] As the court of appeals concluded,

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[5] Indeed, the two subsequent decisions affirm Commission decisions permitting charges for transportation of empty cars to and from repair facilities because, in the Commission's view, particular characteristics of the charges took them outside the scope of the

then, its affirmance of *Indiana Harbor II* as a reasoned exercise of agency discretion poses no conflict with the Seventh Circuit's similar affirmance of *Indiana Harbor I* (and subsequent cases) as a reasoned exercise of agency discretion.

3. Petitioners further contend (Pet. 18-20) that the Commission's decision is arbitrary and capricious. According to petitioners, the Commission's decision "addresses purported concerns about cross-subsidization and misallocation of empty repair move costs among *railroads* by shifting those costs away from the railroads altogether and onto private car *providers*" (Pet. 19). Petitioners maintain that, under the common carrier doctrine reflected in 49 U.S.C. 11121(a)(1), railroads must bear the cost of maintaining and owning the cars. And petitioners object that, under the Commission's decision, private car owners will not be able to recover their full costs.

The court of appeals correctly rejected these objections. As the court pointed out, petitioners' contention that no empty car repair move costs should be borne by noncarriers would require the Commission to treat empty car repair move costs differently from other ownership costs. Pet. App. 18a. Moreover, private car providers are not entitled to a guarantee of full recovery of ownership costs. See *LO Shippers Action Comm.* v. *Aberdeen & Rockfish R.R.*, 4 I.C.C.2d 1, aff'd *sub nom. LO Shippers Action Comm.* v. *ICC*, 857 F.2d 802 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 2429 (1989). As the court of appeals

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Indiana Harbor I prohibition of such charges. See Pet. App. 41a (Commission explanation that several cases after *Indiana Harbor I* permitted charges for empty car repair moves). Like the Seventh Circuit's decision affirming *Indiana Harbor I*, moreover, the two subsequent decisions rest on a conclusion that the Commission's action was a permissible administrative decision. See *Evans*, 729 F.2d at 1111; *Atchison, T.&S.F. Ry.*, 611 F.2d at 1189-1190.

explained, "[p]rivate car providers have no statutory right to insulate themselves from market forces generally in fixing allowances to be paid by carriers for the use of railcars" (Pet. App. 18a); as a result, "providers have no right to sequester the empty-repair-move component of ownership costs from market forces." *Ibid.* The Commission's decision that empty repair moves should be treated like other ownership costs thus was entirely reasonable.

4. Finally, petitioners contend (Pet. 21-25) that, even if the change in policy was permissible, the Commission should not have applied it to the parties in the proceeding in which it was announced. Petitioners apparently do not dispute that an agency is "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance in the [agency's] discretion." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). See also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency"). Rather, petitioners' contention is that the proceeding was converted into a rulemaking when the agency solicited outside comments on its proposed change in policy, and that, as *Bowen* v. *Georgetown University Hospital*, 109 S. Ct. 468 (1988) makes clear, a rulemaking ordinarily may not be applied retroactively.

As the court of appeals pointed out, however, an adjudication is not transformed into a rulemaking simply because an agency solicits general comments. Pet. App. 25a. Just as an agency "has discretion to decide that the adjudicative procedures in [a] case may * * * produce the relevant information necessary to mature and fair consideration of the issues" (*Bell Aerospace*, 416 U.S. at 295), so too an agency may decide that allowing affected parties

to comment may aid that "mature and fair consideration of the issues," and its decision to do so does not convert an adjudication into a rulemaking. Petitioners' claim that the adjudication became a rulemaking through the solicitation and receipt of comments is thus unavailing.

Petitioners also maintain that the court of appeals' decision conflicts with Justice Scalia's concurrence in *Georgetown University Hospital.* Pet. 23-24. Once petitioners' erroneous premise that the solicitation of comments converted the adjudication into a rulemaking is rejected, however, it is clear that the court of appeals' decision—and the Commission decision which it affirms—actually reflect the distinction between rulemaking and adjudication emphasized in the concurrence. The concurrence noted that, under the Administrative Procedure Act, "rules have legal consequences only for the future" and that adjudications have "future as well as past legal consequences." 109 S. Ct. at 476. Consistent with this distinction, the Commission applied the principle it announced to the parties in this adjudication. See *Georgetown University Hospital*, 109 S. Ct. at 478 (concurring opinion) (in an adjudication, "retroactivity is not only permissible but standard"). As the court of appeals concluded, moreover, application of the newly announced principle in this proceeding was fair and equitable. Pet. App. 26a-27a.[6]

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[6] Petitioners suggest (Pet. 24) that the court of appeals' opinion accompanying the denial of the petition for rehearing recognized a conflict between its opinion and the *Georgetown University Hospital* concurrence. Like the concurrence (109 S. Ct. at 478, 480), however, the court of appeals recognized that adjudications must ordinarily be applied retroactively and that new principles may be announced in adjudications and applied retroactively. Pet. App. 26a. As petitioners note (Pet. 21), the rehearing opinion states that "[w]hile arguments no doubt can be advanced in support of limiting agencies' policymaking use of the adjudicatory form to circumstances where 'legal consequences hinge upon the interpretation of statutory requirements, and where no pre-existing interpretive rule construing those requirements is in effect,' *Georgetown Univ. Hosp.*, 109 S. Ct. at 480 (Scalia, J.,

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1990

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concurring) * * * the law of this circuit is emphatically to the contrary." Pet. App. 34a. This statement in the rehearing opinion does not, however, suggest any conflict on the general applicable principles. In any event, the Commission's change here did not involve a change in a "pre-existing interpretive rule"; the *Indiana Harbor I* policy itself was developed through adjudication. Petitioners' related suggestion that the court of appeals' decision conflicts with decisions of the Ninth Circuit and the Fifth Circuit (Pet. 24-25) regarding the use of adjudications to change policy is also insubstantial. The Ninth Circuit clearly recognizes that "[a]dministrative agencies are free to announce new principles during adjudication" (*Cities of Anaheim* v. *FERC*, 723 F.2d 656, 659 (1984)), provided the adjudication does not impose undue hardship and neither amends a recently adopted rule nor supplants a pending rule-making proceeding; neither condition is present here. Similary, the Fifth Circuit decision relied on by petitioners simply applied the settled *Chenery* principle that the choice between rulemaking and adjudication is primarily the agency's, and upheld the agency's decision to proceed by rulemaking. *Nueces County Navigation District No. 1* v. *ICC*, 674 F.2d 1055, 1065-1066, cert. denied, 459 U.S. 1035 (1982).

* The Solicitor General is disqualified in this case.

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